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In the Supreme Court of the United States

OCTOBER TERM, 1973

ANTHONY J. SPILOTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. In May 1971, petitioner filed a complaint in the United States District Court for the Northern District of Illinois, seeking a refund of federal wagering taxes. He alleged that the assessment was invalid because it was based on illegally seized evidence. The government denied the illegality of the assessments and counterclaimed for the balance of the assessment (Pet. App. 2).

On October 4, 1971, the government served 15 interrogatories upon petitioner which were to be answered within 30 days. These interrogatories related to the sources of petitioner's income, his wagering activities and the evidence upon which petitioner based his claim that he was not engaged in gambling. Petitioner did not submit responses to the interrogatories at the required time. However, on November 8 and December 16, 1971, the court granted petitioner an extension of

time to January 5, 1972 within which to file his answers or objections to the interrogatories (Pet. App. 2-3).

After the expiration of the extended time period, petitioner had not answered or objected to the interrogatories. Accordingly, on February 11, 1972, the government moved either to dismiss the complaint for failure to answer the interrogatories, or to compel petitioner to answer them (Pet. App. 2-3).

On February 24, 1972, almost five months after the original service of the interrogatories and almost two months after his extended time to answer or object, petitioner filed objections, which simply stated that the questions were "constitutionally impermissible" and that the interrogatories were irrelevant because the assessment was based on illegally obtained evidence. On April 28, 1972, the district court ruled[1] that petitioner's blanket objections were inappropriate and not timely under Rule 33 of the Federal Rules of Civil Procedure[2] and ordered petitioner to answer the interrogatories within 20 days. Petitioner's motion to vacate the order was denied. After petitioner failed to answer the interrogatories the court dismissed the complaint

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[1] A copy of the district court's memorandum opinion and order is set forth in Appendix, *infra*.

[2] Because of petitioner's failure to object to the interrogatories in an appropriate and timely manner, the district court correctly refrained from ruling on the substance of his objections. It appears that certain evidence had been suppressed in a state criminal proceeding. However, petitioner introduced no evidence in the district court showing that the evidence upon which the assessment was based was the same evidence at issue in the state proceeding or that it had been illegally seized under federal standards. Cf. *Elkins* v. *United States*, 364 U.S. 206, 223-224.

and entered judgment on the counterclaim (Pet. App. 3-4). The court of appeals affirmed *per curiam* and denied a petition for rehearing and suggestion for rehearing and suggestion for rehearing *en banc* (Pet. App. 1-7).

2. As the court of appeals correctly noted (Pet. App. 4), the only question presented by this case is whether the district court abused its discretion in dismissing the complaint and entering default judgment because petitioner repeatedly ignored the requirements of the Federal Rules of Civil Procedure. Rule 37(b)(2)(C) provides that the sanction of dismissal may be applied if a party fails to comply with discovery orders. Here petitioner repeatedly ignored the time limitations of Rule 33.[3] The fact that petitioner's objections asserted that his constitutional rights had been violated does not excuse his failure to timely raise the issue. *Yakus* v. *United States,* 321 U.S. 414, 444; *Michel* v. *Louisiana,* 350 U.S. 91, 99. Under these circumstances, the district court acted within its discretion in applying the sanction of dismissal.

3. Petitioner also contends (Pet. 9, 16) that, apart from the question of the timeliness of his objections to the interrogatories, the district court improperly required him to answer them. Petitioner simply asserted in the district court that the questions were "constitutionally impermissible." But, as the court of appeals correctly noted (Pet. App. 4, n. 1), "[e]ven when the objections were belatedly filed, they were broad, vague and non-specific." Such blanket objections, without a showing with respect to each of the interrogatories

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[3] Rule 33(a), Federal Rules of Civil Procedure, provides that interrogatories shall be answered or objected to within 30 days. Rule 6(b) requires that requests for enlargements of time after time has expired be made by motion.

as to how they confronted petitioner with "substantial hazards of self-incrimination,"[4] are not sufficient to invoke any constitutional protection against providing the required answers. *California* v. *Byers*, 402 U.S. 424, 429; *Hoffman* v. *United States*, 341 U.S. 479, 486.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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[4] As the court of appeals stated (Pet. App. 5), petitioner could not be criminally convicted for failure to file wagering tax returns. *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 71 C 1284

ANTHONY J. SPILOTRO, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

MEMORANDUM OPINION AND ORDER

This motion for an order to compel the plaintiff to answer interrogatories 1 through 15 or in the alternative to dismiss the complaint arises out of a refund suit against the United States for monies allegedly seized illegally by the Chicago, Illinois, District Director of the Internal Revenue Service pursuant to an allegedly invalid tax assessment.

As a part of its discovery, the defendant requested the plaintiff to answer separately and fully fifteen interrogatories. The plaintiff was further requested to state reasons for his inability to answer in full or part any interrogatory and to state such information or knowledge as he may have concerning the unanswered interrogatory.

The defendant served the interrogatories to plaintiff on September 27, 1971, and plaintiff failed to answer or object within the thirty-day period provided for by Rule 33(a) of the Federal Rules of Civil Procedure, as amended. From that date until the filing of the defendant's February 11, 1972, motion to dismiss, the plaintiff filed no formal objections to the interrogatories. On February 25, 1972, he filed an objection to all the interrogatories based on the twofold ground that they were irrelevant and constitutionally impermissible.

It is plaintiff's position that if the tax assessment is based upon illegally seized gambling records, the tax, itself, is rendered illegal. He further maintains that in utilizing the discovery process the Government seeks to obtain legally evidence which it already possesses—such evidence having been obtained from a search adjudged illegal by an Illinois Circuit Court Judge. The Government in an articulate oral argument raised the following issues.

The substantive issues raised are (1) whether or not this taxpayer had a proprietary interest in a gambling operation and (2) assuming *arguendo* that such a proprietary interest exists, what is the correct amount of his liability?

Before reaching these substantive issues, however, it is the Government's position that the following six procedural issues must be resolved:

(1) whether a decision of a State Court to suppress evidence in a criminal proceeding is binding on a Federal Court in a civil proceeding;

(2) whether the State criterion for determining an illegal search should be applied in a Federal suppression of evidence hearing;

(3) whether this taxpayer has standing to complain of a search of someone else's apartment;

(4) whether this taxpayer can exclude evidence in a civil case that may have been discovered in a defective search;

(5) assuming *arguendo* (a) the defective search, (b) the standing to complain, and (c) the exclusion of the fruits of such defective search in a civil case, whether an administrative deter-

mination of a civil Federal tax liability is arbitrary merely because it allegedly is based in part upon evidence adjudged in a State criminal proceeding to be illegally seized; and

(6) whether this taxpayer in a civil tax refund suit may prevail merely by proving a procedural irregularity because, as the Government contends, the Commissioner in his administrative determinations may rely on inadmissible evidence, whether it be hearsay or excludable evidence.

It is to be noted that an issue similar to issue four has been decided against the taxpayers in *Romanelli* v. *Commissioner*, 54 T.C. No. 138 (July 2, 1970), which presently is pending before the Seventh Circuit.

This Court need not reach these issues to decide the matter before it.

As the Government correctly contends, a party is under a duty to respond to interrogatories submitted under Rule 33. As a leading treatise states in pertinent part (4A Moore's Federal Practice §37.05 at p. 37-90 [2d ed. 1971]):

> "* * * it is crucial, * * * that the initial request be answered and such objections as the party may have be set forth. If it were necessary to seek a court order requiring a response, followed by a response setting up objections, followed by a second motion to resolve the objections and order discovery, the possibility for delay and abuse would be apparent. Rule 37(d) makes it explicit that a party properly served had an absolute duty to respond, that is, to * * * serve answers or objections to interrogatories served upon him, * * * and that

> the court in which the action is pending may enforce this duty by imposing sanctions for its violation. * * *"

More than 150 days passed before this taxpayer filed any formal response or objection to the Government's interrogatories. And even when a response was filed, it was not in accordance with Rule 33, which provides that "each interrogatory shall be answered separately and fully in writing under oath." The taxpayer made a blanket objection to all interrogatories on the grounds that they were irrelevant and constitutionally impermissible. No attempt was made to separate the irrelevant from the constitutionally impermissible.

The lateness of the hour makes it inappropriate for the Court to entertain the taxpayer's objections. He has waived his objections by failing to timely respond.

Accordingly, it is hereby adjudged, ordered and decreed that the plaintiff taxpayer answer the fifteen interrogatories within twenty days commencing from the date of this order.

ENTER:

JAMES B. PARSONS,
United States District Judge

Dated: April 28, 1972.